

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LATT v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 766

MIGRATION – Partner (Migrant) (class DC) subclass 100 visa – relevance of delegate’s decision – whether Tribunal should take into account delegate’s findings that the relationship is genuine and ongoing – relevance of grant of temporary visa – whether failure to consider Regulation 1.15A(3)(d)(i) and (ii) and/or 1.15A(5) of Migration Regulations – interpretation of ‘genuine spousal relationship’ – whether Tribunal erred in referring to ‘a close mutually supportive and emotionally connected relationship’ when considering ‘all the circumstances of the relationship for the purpose of Regulation 1.15A(3)’ – whether failure to comply with s.359A.

Migration Act 1958, s.359A

Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464

Ho v Minister for Immigration & Anor [2006] FMCA 1285

Davis v Minister for Immigration & Multicultural & Indigenous Affairs (with Corrigendum dated 30 September 2004) [2004] FCA 686

Zhang v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 30

Sevim v Minister for Immigration & Multicultural & Indigenous Affairs [2001] FCA 1597

Minister for Immigration and Multicultural Affairs v Wu Shan Liang (1996) 185 CLR 259

VAF v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 206 ALR 471

Applicant: MYO LIN LATT

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: MLG 982 of 2006

Judgment of: McInnis FM

Hearing date: 24 April 2007

Delivered at: Melbourne

Delivered on: 22 May 2007

REPRESENTATION

Counsel for the Applicant: Mr G Gilbert

Solicitors for the Applicant: Holding Redlich

Counsel for the First
Respondent: Mr W Mosley

Solicitors for the First
Respondent: Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2) The Applicant shall pay the First Respondent's costs fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 982 of 2006

MYO LIN LATT
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. In its decision the Tribunal affirmed a decision of a delegate of the First Respondent not to grant to the Applicant a Partner (Migrant) (Class DC) subclass 100 visa (a partner visa).
2. The Applicant is a male Burmese national born 21 May 1976. On 12 November 2002 he met a female Australian citizen of Burmese origin, namely, Aish Farooq Mamsa born 8 May 1982 ("the sponsor") in Burma. The Applicant had known the sponsor before she migrated to Australia.
3. On 11 December 2002 the Applicant married the sponsor in a ceremony in Rangoon.
4. The parties lived together for about one month after their marriage and the sponsor then returned to Australia.

5. On 14 January 2003, the Applicant lodged a combined application for a spouse (Class UF) visa subclass 309 ("the temporary visa") and a partner visa.
6. The Applicant was nominated by the sponsor who had returned to Australia in January 2003.
7. The Applicant was granted a temporary visa on 8 September 2003. He arrived in Australia on 12 March 2004.
8. On 3 November 2004 the Department received a letter from the sponsor advising that she had been separated from the Applicant for two months and that she no longer wished to sponsor him.
9. By letter dated 9 November 2004 (Court Book p.35) the Department notified the Applicant of the information it had received from the sponsor and requested a written response. In part the letter stated:

"Information provided to this office indicates that the spouse relationship upon which your application was based has ceased. This is likely to result in the refusal of your application. However, before a decision is made on your application, you have the opportunity to provide a response, explaining your current circumstances and the reason for the breakdown of your relationship."

10. By a letter dated 21 January 2005 (Court Book Ppp.41-58) the Applicant through a migration agent responded to the letter from the Department and annexed statutory declarations declared by himself, a social worker and a psychologist.
11. In his response the Applicant claimed that he has suffered domestic violence at the hands of the sponsor.
12. On 14 February 2005 the sponsor advised the First Respondent's Department that she had filed for divorce (Court Book p.59). The comment, which claimed to have been submitted "via the contact minister web form" the following statement:

*"... I am an Australian citizen. I am only 22 years old. He is accusing me of Domestic Violence. How could that happen? He is using one of your three rules to become a permanent citizen.
..."*

13. On 21 March 2005 a delegate of the First Respondent refused to grant the Applicant a partner visa (Court Book pp.60-75).
14. On 15 April 2005 the Applicant applied to the Tribunal for review of the delegate's decision and supplied further material in support of the application (Court Book pp.82-99).
15. The Applicant attended a hearing at the Tribunal on 13 April 2006.
16. On 19 April 2006 the Tribunal forwarded a letter to the Applicant inviting him to comment on information pursuant to s.359A of the *Migration Act 1958* ("the Act") (Court Book pp.100-102). The Applicant responded by letters dated 16, 19 and 21 June 2006 (Court Book pp.103-150).
17. On 5 July 2006 the Tribunal handed down its decision dated 23 June 2006 which as indicated earlier in this judgment affirmed the delegate's decision not to grant a partner visa.
18. The Applicant then filed an application in this court on 3 August 2006 seeking judicial review of the Tribunal decision.

Relevant Legislation

19. The relevant legislation has been accurately set out in the First Respondent's contentions as follows:

"13. The statutory criteria for the grant of a subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 ('the Regulations'). There are no time of application criteria and the time of decision criteria are in clause 100.22 which relevantly provides:

'100.22 Criteria to be satisfied at time of decision

100.221(1) The applicant meets the requirements of subclause (2), (2A), (3), (4) or (4A).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant:

(i) is a holder of a Subclass 309 (Spouse (Provisional)) visa; or

(ii) ...; and

(b) the applicant is the spouse of the sponsoring spouse; and

(c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.

...

(4) The applicant meets the requirements of this subclause if:

(a) the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa and either:

(i) continues to be the holder of that visa; or

(ii) ...

(b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring spouse has ceased; and

(c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a) - either or both of the following circumstances applies:

(i) either or both of the following:

(A) the applicant;

(B) ...

has suffered domestic violence committed by the sponsoring spouse;

(ii) ...'

14. The definition of the word 'spouse' is contained in regulation 1.15A(1) and (1A) of the Regulations and relevantly provides:

‘1.15A. (1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A); or

(b) ...

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.’

15. Regulation 1.15A(3) sets out the matters to which the Tribunal is to have regard in forming the opinion whether parties are in a married relationship. Further reg 1.15A(5) provides:

‘If 2 persons have been living together at the same address for 6 months or longer, that fact shall be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.’”

The Tribunal Decision

20. In its decision the Tribunal referred to subclauses 100.221(2)(b) and 100.221(4)(b). It referred to relevant authorities and then relevantly stated:

“46. In light of these authorities and the wording of 100.221(4)(b) the Tribunal finds that 100.221(4)(b) involves an assessment of whether the visa applicant had been the

sponsor's spouse and would continue to be except that the spousal relationship ceased and the sponsor had died or the applicant had been the subject of domestic violence perpetrated by the sponsor. Accordingly, before undertaking an analysis of whether domestic violence is taken to have occurred under Division 1.5 of the Regulations, the Tribunal has considered whether at the time prior to the cessation of the relationship the sponsor and the visa applicant were in a spousal relationship. In his submission dated 19 June 2006 the visa applicant's agent submitted that Guven 'only stands for the proposition that the relationship only has to have been spousal at some point in time not necessarily when the domestic violence occurred or at any other particular point.' The Tribunal accepts that the question as to whether there is any particular point in time at which the relationship has to have been spousal in order for the perpetrator of the domestic violence to be deemed a 'spouse' for the purposes of the domestic violence provisions has not yet been addressed judicially. The Tribunal has considered whether the parties were, at any point in time, in a genuine spousal relationship."

(Court Book p.160)

21. The Tribunal then after considering relevant issues, made the following significant finding:

"64. ... In light of the brevity of the relationship, the focus of the sponsor on accessing the visa applicant's money and the absence of mutuality of support and companionship the Tribunal is not satisfied that at any time the parties were in a spousal relationship as contemplated by regulation 1.15A."

(Court Book p.166)

22. The Tribunal then found that the Applicant was not in a spousal relationship that ceased within the meaning of clause 100.221(4)(b). It then relevantly stated:

"62. Having found that the visa Applicant does not satisfy an essential criterion for the grant of the visa, the Tribunal need not consider the remaining criteria, or make a finding in relation to her claims of domestic violence (sic)."

23. (Court Book p. 166)

24. The claims of the domestic violence are clearly meant to refer to the claims of the Applicant and not the sponsor and presumably the reference to "her" is meant to be "his".

Grounds of Application

25. The Applicant relied upon an application filed 3 August 2005 though did not pursue all the particulars subjoined to Ground 1 in that application. However, the Applicant did pursue the following particulars:

- “(c) The Tribunal erred in failing to take into account the grant of the subclass 309 visa on 8 September 2003, which grant included a finding that as at the date of application, namely 14 January 2003, the parties were in a genuine spousal relationship.*
- (d) The Tribunal erred in going behind the grant of the subclass 309 (visa) to make a finding which was inconsistent with that decision, in particular that the wedding in Burma on 11 December 2002, and their living together in Burma for a month until the sponsor returned to Australia in January 2003, did not reflect ‘a genuine commitment to marry and share a life together.’*
- (e) The Tribunal, having accepted that the parties had lived together for a month in Burma, and from March 2004 until at least August 2004, being a period of six months or more, failed to take into account two relevant considerations which it was bound to take into account, namely, the operation of Reg. 1.15A(d)(i) and (ii) and the operation of the statutory presumption in Reg. 1.15A(1)(5).*
- (f) The Tribunal misinterpreted and/or misconstrued Reg. 1.15A(3)(d) in that it required a ‘close mutually supportive, emotionally connected relationship’, a test not found in the Regulations.*
- (g) The Tribunal acted in breach of s.359A of the Migration Act in not advising the applicant in writing that a reason or part of the reason for the decision would be that the sponsor did not at any point in time have a genuine commitment to a shared life with the applicant.”*

Grounds 1 and 2 – Grant of the subclass 309 visa

Applicant's submissions

26. It was submitted on behalf of the Applicant that as at the date of application for the subclass 309 visa, namely, 14 January 2003, a delegate found that the parties were in a genuine spousal relationship (Supplementary Court Book p.1-6 at p.4). That decision was made one month after the parties were married. They have been living together since their wedding. It was submitted the Tribunal failed to take into account this finding.
27. The finding of the delegate referred to in the Supplementary Court Book includes the following:
- “Assessment: I have considered information available on the case – application, supporting documentation and information presented at interview. I am satisfied that relationship is genuine and ongoing.”*
28. It was submitted that there is no time of application criteria for the partner visa. It was argued the grant of a subclass 309 visa (the temporary visa) *"effectively stands in place of the usual criteria"*. It was argued the Tribunal considered afresh the marriage and period of cohabitation prior to the application for the temporary visa and came to a contrary conclusion to the delegate. The Tribunal, contrary to the delegate, was not satisfied that the mutual commitment and emotional support were ever evident in the relationship. The Applicant submitted that it was *"not open to the Tribunal to reconsider the same question as the delegate and effectively overturn the decision"*. It was further submitted that, *"If it was considered that the sponsor was never committed to the relationship, or that the relationship was entered into for purely migration motives, the appropriate course would have been to initiate cancellation procedure in relation to the subclass 309 visa (based on an allegation of incorrect information)."*
29. During the course of the hearing, however, it was noted the power of the Tribunal is limited to reviewing the decision of the delegate, and that it would not be appropriate to expect the Tribunal to initiate a cancellation procedure.

First respondent's submissions

30. It was submitted on behalf of the First Respondent that it does not follow that the holding of a temporary visa precludes the Tribunal from assessing whether it was satisfied of the existence of a genuine spousal relationship when considering the criteria to be satisfied for the grant of the partner visa.
31. The First Respondent submitted that the delegate's decision concerning the temporary visa was made in September 2003 whereas the Tribunal considered the partner visa application in June 2006.

Reasoning

32. In my view this ground should fail. I can see no basis upon which it can be suggested there is jurisdictional error simply because the Tribunal did not have regard to the delegate's decision or that it otherwise fell into error by making an assessment of the relevant criteria for the partner visa which led it to reach a contrary conclusion to the conclusion of the delegate. The delegate had only to consider material in a somewhat superficial manner for the grant of a temporary visa. That process is entirely different to the process to be undertaken upon consideration of the criteria for the grant of a partner visa.
33. In my view there is no legal basis upon which it could be suggested that the decision to grant a temporary visa, albeit, involving some assessment of the facts then before the delegate should somehow be automatically binding and/or even taken into account by another delegate when considering the criteria for the grant of a partner visa. I do not accept that the grant of a temporary visa in any way should act as a substitute for the reasoning process to be undertaken when assessing the relevant criteria for the grant of a partner visa. Accordingly this ground should fail.

Ground 3 – Failure to consider Regulation 1.15A(3)(d)(i) and (ii) and/or 1.15A(5)

Applicant's submissions

34. It was noted that the Tribunal made findings whereby it accepted that the Applicant and sponsor had lived together in Burma for a month after their wedding. Further it was noted that in its decision the Tribunal accepted that the parties resided together from March 2004 to August or September 2004 in Australia. It is appropriate to set out the relevant findings of the Tribunal as follows:

“53. Following the wedding in Burma he and sponsor moved into their own rented accommodation in Burma for about a month before the sponsor returned to Australia. The visa applicant arrived in Australia on 12 March 2004 and lived with the sponsor in a home owned by the sponsor’s parents in Briggs Crescent, Noble Park. In about September 2004 he moved out of the house into the garage due to conflict with the sponsor and in November 2004 moved to another address.

...

60. *While the visa applicant asserts that he and the sponsor got on well for the first 2 months following his arrival in Australia in March 2004 the Tribunal also notes his evidence to the Tribunal at the hearing that the sponsor almost immediately started to ignore him, take advantage of him financially and go out socially without him. It became apparent that they were not compatible and had fundamentally different expectations of each other. Whilst the parties continued to live together the relationship was characterised by arguments over money and lifestyle and the parties’ dissatisfaction with each other. Although the parties lived together for 5 or 6 months between March 2004 and September 2004, (when the visa applicant moved into the garage at the Briggs Crescent premises) the Tribunal is not satisfied that the relationship ever gelled into a spousal relationship as defined before it ended in August or September 2004. In light of the paucity of evidence of a genuine social dimension to the relationship, the absence of evidence of shared household duties and the sponsor’s lack of support for and commitment to the visa applicant, the Tribunal finds that, whilst the parties were in a relationship*

of sorts when they resided at the Briggs Crescent premises, it is unable to pinpoint any point in time when it had evolved into the kind of mutually supportive and genuinely committed relationship that would meet the requirements of regulation 1.15A. The sponsor's behaviour towards him was inconsistent with a genuine commitment to him.

...

63. *The Tribunal notes that the parties met up again in November 2002, and married in December 2002 but, given the brevity of time together and the significant difference in lifestyle and backgrounds, is not satisfied that the parties had formed a genuine spousal relationship or that the wedding reflected a genuine commitment to marry and share a life together."*

35. It was submitted that this period which totalled in excess of six months should have been considered pursuant to Regulation 1.15A(3)(d) and 1.15A(5).

36. Counsel for the Applicant referred the court to the decision of French J in *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 where the court states:

"12 It is submitted that the Tribunal effectively failed to treat the period for which the applicant and sponsor have been living together as strong evidence and therefore failed to comply with the direction in subreg 1.15A(5). The respondent points to the decision of the Full Court in Minister for Immigration and Multicultural Affairs v Asif 60 ALD 145 where, at par 23 the Court said of reg 1.15A(5):

This subregulation creates something in the nature of a statutory presumption of the existence of a genuine marital relationship between the visa applicant and spouse, where they have cohabited for at least 6 months: such cohabitation is taken to be "strong evidence" that the relationship is genuine and continuing. This subregulation is so worded as to suggest that where the decision-maker has to decide whether a genuine marital relationship existed between a visa applicant and spouse who were together at a particular date, if at the time the question arises for determination the applicant and spouse have been together for 6 months (or more) that is to be taken as strong evidence that they were in a genuine

and continuing relationship at the relevant date. To read this subregulation as the respondent would as making 6 months (or more) cohabitation strong evidence of a genuine and continuing relationship at a particular date only if the minimum 6 months' period had already passed by that date involves an unwarranted gloss on what we, regard as the clear words of the subregulation.'

The important element of that is the observation that the subregulation creates something in the nature of a statutory presumption.

- 13 *In a single judge decision in Davis v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 686 Dowsett J said:*

'The applicant and Mr Davis had been living together for more than six months at the relevant time. The Tribunal was aware of the evidentiary significance of this fact and referred to it expressly in its reasons. See para 39. However that provision did not fetter the power of the tribunal to determine the weight to be given to other evidence. Even in the absence of a provision such as subregulation 1.1(5)A(5), it would obviously be necessary to give great weight to the fact that the parties had lived together for a substantial period of time prior to the application. There is no reason to believe that the Tribunal did not do so.

- 14 *Then in Lumanovska v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1321, an earlier decision of Gray J, his Honour said at [17]:*

'It is plain from an examination of the passage from the Tribunal's reasons that I have already quoted that the Tribunal did precisely what was required by reg 1.15A(5). In the heading to that portion of its reasons for judgment, the Tribunal expressly noted that subreg (5) provided that living together at the same address for six months or longer is to be taken to be strong evidence that a relationship is genuine and continuing. It then proceeded to engage in the balancing exercise to see whether other evidence that it had as to the nature of the relationship outweighed this strong evidence. It recited that the parties had not lived together as husband and wife in the first four years of their marriage. While accepting that they had shared a house in Kirkham Road since February

2002, the Tribunal found it was not satisfied that the applicant and the nominator then lived together as husband and wife.'

15 *In this case, the Tribunal has made express reference to the requirement of subreg 1.15A(5) that:*

'...living together at the same address for 6 months or longer is to be taken to be strong evidence that a relationship is genuine and continuing...'

However, it set against that other evidence before it and its satisfaction that that evidence established that the relationship was not genuine and continuing at the time of the application."

37. It was argued that Regulation 1.15A(5) creates a statutory presumption.
38. In the present case it was submitted the Tribunal failed *"entirely to consider the operation of s.1.15A(5) and that this amounts to jurisdictional error."* Reference was made to *Ho v Minister for Immigration & Anor* [2006] FMCA 1285 (Ho).
39. During the course of submissions, counsel for the Applicant referred to the Tribunal's decision and that whilst the Tribunal had recited Regulation 1.15A(5) (Court Book p.162) it did not proceed to consider that matter as a separate or discrete issue. Rather reference was made to the duration of the relationship when considering other criteria. For example, the reference to the period of time the parties lived together in Burma appears under the heading *"The nature of the household"*. Further, the reference in paragraphs 57 and 60 of the Tribunal decision appear under the heading, *"Whether there is a mutual commitment to a shared life as husband and wife to the exclusion of all others"*. It was submitted this was not sufficient when dealing with the requirements of Regulation 1.15A(5).

First respondent's submissions

40. The First Respondent submitted that there is *"nothing to suggest the Tribunal failed to have regard to the content of subregulation 1.15A(5)"*. It was submitted the Tribunal considered the evidence of the living arrangements at some length.

41. Specific reference was made to paragraph 60 of the Tribunal decision set out earlier in this judgment where the Tribunal stated:

“60. ...Although the parties lived together for 5 or 6 months between March 2004 and September 2004, (when the visa applicant moved into the garage at the Briggs Crescent premises) the Tribunal is not satisfied that the relationship ever gelled into a spousal relationship as defined before it ended in August or September 2004. ...”

42. It was submitted that Regulation 1.15A(5) does not *"fetter to the power of the Tribunal to determine the weight to be given to other evidence"*. It is able to set other evidence against the content of Regulation 1.15A(5). Reliance was placed upon the decision of Dowsett J in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* (with Corrigendum dated 30 September 2004) [2004] FCA 686 where the Court relevantly states:

“38. The applicant and Mr Davis had been living together for more than six months at the relevant time. The Tribunal was aware of the evidentiary significance of this fact and referred to it expressly in its reasons. See par 39. However that provision did not fetter the power of the Tribunal to determine the weight to be given to other evidence. Even in the absence of a provision such as subreg 1.15A(5), it would obviously be necessary to give great weight to the fact that the parties had lived together for a substantial period of time prior to the application. There is no reason to believe that the Tribunal did not do so. There is nothing in this point.”

43. In the present case it was submitted the Tribunal considered the matters made relevant by Regulation 1.15A(3), and in particular sub-regulation 1.15(3)(d). It was argued that it is not required to refer to specific items of evidence relied upon by the Applicant nor was it required to make express findings about each of the matters referred to under the subheadings of Regulation 1.15A(3) (see *Zhang v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 30 at [20]).

Reasoning

44. In my view, the present case can be distinguished from the decision of the court in *Ho*. In the present case the Tribunal referred to Regulation 1.15A(5). It then proceeded to make specific findings concerning the duration of the relationship. In my view, it is not relevant that those findings appear under the heading of ‘*Other Criteria*’. The relevant finding, in my view, is the finding which appears at paragraph 60 set out earlier in this judgment.

45. The Tribunal made a finding reasonably open to it concerning the duration of the period of time when the parties lived together at the same address and was entitled to refer to that as being a period of “*for 5 or 6 months*”. It was then entitled, relevantly, to make the more general finding, which should be taken to include all matters under Regulation 1.15A, when it decided that:

“60 ... whilst the parties were in a relationship of sorts when they resided at the Briggs Crescent premises, it is unable to pinpoint any point in time when it had evolved into the kind of mutually supportive and genuinely committed relationship that would meet the requirements of regulation 1.15A. ...”

46. I note further the Tribunal states the following in its decision:

“61. This assessment is not based on any one item of evidence or the absence of any one item of evidence but on an assessment of the relationship in its entirety from its inception until it ended in August 2004. The Tribunal has considered each phase of the claimed relationship and makes the following findings:”

47. It is clear to me from that paragraph and the other significant findings of the Tribunal that it has properly considered the criteria contemplated by Regulation 1.15A, including the duration of time that the parties lived together for the purposes of Regulation 1.15A(5). Accordingly, this ground should fail.

Ground 4 – Incorrect interpretation of genuine spousal relationship

Applicant's submissions

48. It was submitted on behalf of the Applicant that the Tribunal, in paragraph 57 of its decision set out earlier in this judgment, had erred by claiming that Regulation 1.15A(3)(d) contemplated a "*close and mutually supportive, emotionally connected relationship*". The Applicant submitted that this imposed a test "*which is more onerous than that required by the regulations*".
49. Reference was made to the decision of the Full Court in *Sevim v Minister for Immigration & Multicultural & Indigenous Affairs* [2001] FCA 1597 and in particular the following:

"67 It appears from the Tribunal's reasons for decision that it also considered this issue in the context of its determination of the question whether the applicant should have been granted the subclass 820 visa. In so doing, the Tribunal acted outside its powers. For the reasons I have already expressed, the Tribunal had no jurisdiction to review a decision to grant a visa. On no view could an error of fact on the part of the delegate of the Minister who made the decision to grant the subclass 820 visa be regarded as bringing about the result that the decision was a nullity. The question of the validity of the marriage was, however, relevant to the task of the Tribunal in reviewing the decision to refuse to grant the subclass 801 visa. The criterion found in cl 801.221(2)(c) in Pt 801 of Sch 2 to the Migration Act required that the Tribunal consider whether the applicant was the spouse of the nominating spouse, even if only as a step to considering whether the criterion in clause 801.221(6)(b) was met, namely that the relationship between the applicant and the nominating spouse had ceased. The Tribunal therefore again considered the right question in the wrong context and for the wrong purpose.

- 68 *The Tribunal stated correctly the test for determining whether a marriage is genuine. It quoted the passage from Minister of State for Immigration, Local Government & Ethnic Affairs v Dhillon (Federal Court of Australia, Full Court, 8 May 1990, unreported) at 11 as follows:*

"people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible

to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

- 69 *In Ozbunbar v Minister for Immigration & Multicultural Affairs* (1998) 55 ALD 163, Kiefel J said with respect to what was then reg 126 of the Migration Regulations, which contained provisions as to when a visa applicant was to be regarded as the spouse of an Australian citizen or permanent resident:

"Regulation 126 is concerned with whether there is a genuine marriage relationship. A reference to the reasons why a person married will not be determinative of that question. It has been said that where persons marry for perceived advantages, such as qualification for migration entry, that would not exclude the possibility that the marriage is, nevertheless, genuine: Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (Full Court, Federal Court, 8 May 1990, unreported). It is not necessary in this case to address that aspect of the question. The focus of this application is upon how the relationship is tested. It was held in Dhillon's case that the test of such a relationship is whether, at the time the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life as husband and wife, to the exclusion of others. That has been applied in connexion with regulation 126: Jones v Minister for Immigration and Ethnic Affairs (1995) 37 ALD 454, 457 (Hill J); (1995) 63 FCR 32, 45, 49 (Full Court). The central enquiry will usually be as to the parties' commitment and, as Branson J pointed out in Singh v The Minister for Immigration and Ethnic Affairs (29 April 1996, unreported) whilst there may be some objective facts relevant to, or consistent with, mutual commitment, often times it will require consideration of the parties' stated intentions. The true position will only be known to them. In these

circumstances credibility will often assume importance. Reference to decided cases bears this out."

The element of a mutual commitment to a shared life as husband and wife to the exclusion of all others emerges in the legislation now, in reg 1.15A(1A)(b)(i), quoted above.

- 70 *Counsel for the applicant contended that, having stated the test correctly, the Tribunal then proceeded to misapply it. He referred to the following passage in the Tribunal's reasons for decision:*

"Whilst the visa applicant's evidence supports a commitment to the relationship, there is no evidence that it was reciprocated except to the limited extent that his spouse was prepared to commit herself solely on her own very limited terms."

- 71 *If this were a finding in the application of the test to which I have referred, it would be indicative of error on the part of the Tribunal. It would indicate that the Tribunal had taken the view that a genuine marriage required some parity of commitment between the parties, instead of a commitment by each to the other, as husband and wife, to the exclusion of others. There must be many marriages the parties to which have different levels or degrees of commitment, or in which the commitment of the parties to each other is of a different quality. Such differences do not matter in the application of the test. As long as each party has a commitment of the kind described in the test, the marriage will be genuine even if such differences exist.*

- 72 *The context of the passage I have quoted from the Tribunal's reasons indicates, however, that the Tribunal was not there purporting to apply the test. The passage appears in the course of the discussion of the application of the criterion found in reg 1.15A(3)(d). That criterion specifically examines "the nature of the persons' commitment to each other". It is plain that the Tribunal's finding was directed to this criterion. The sentence I have quoted was followed immediately by:*

"These facts do not illustrate a commitment to each other (regulation 1.15A(3)(e))."

The reference to "(e)" is an obvious error. There is not a par (e) in reg 1.15A(3). It is clear that the Tribunal was

intending to refer again to reg 1.15A(3)(d). The Tribunal then went on to make a specific finding that it could not find on the evidence that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others. It referred in terms to reg 1.15A(1)(b)(i), but must be taken to have intended to refer to reg 1.15A(1A)(b)(i), because there is no subpar (i) in reg 1.15A(1)(b). It concluded that the applicant did not meet the definition of spouse within the meaning of reg 1.15A at the time of the application for the subclass 820 visa. The Tribunal therefore concluded that the applicant did not meet the definition of "spouse" in the criterion in item 801.221(2)(b) of Sch 2 to the Migration Regulations. He was therefore ineligible to be granted a subclass 801 visa.

73 *There is no error of a kind that would fall within one of the grounds in s 476 of the Migration Act apparent in this reasoning of the Tribunal. Although it considered the issue of the validity of the marriage for the wrong purpose, namely the validity of the decision to grant the subclass 820 visa, the Tribunal also recognised the relevance of that issue for the purpose of the task before it. The extraneous consideration of the validity of the decision to grant the subclass 820 visa was an error, but it was not an error affecting the Tribunal's decision. The decision that the applicant was not entitled to a subclass 801 visa would have been the same in any event."*

50. It was argued that the Tribunal had misconstrued an essential criteria for the grant of a visa and thereby committed jurisdictional error.

First respondent's submissions

51. The First Respondent submitted that the Tribunal's reference in paragraph 57 of its decision to a "*close mutually supportive, emotionally connected relationship*" was no more than a comment on the type of relationship envisaged by the regulations. The Tribunal, it was submitted, has not introduced a different test under the regulations. It was noted that in the next sentence the Tribunal relevantly stated the following:

"57. ... In particular, having reviewed the history of this relationship the Tribunal is not satisfied that mutual commitment and emotional support were ever evident in the relationship. ..."

52. The First Respondent submitted that the Tribunal's findings were specifically relevant under the Regulations. In particular, Regulation 1.15A(3)(d) provides for an assessment of emotional support that the parties *"draw from each other"*; and that it is fundamental that the parties have a mutual commitment to a shared life together, pursuant to Regulation 1.15A(1)(b)(i).
53. It was further submitted that:
- "... It is not in any event to be overlooked that subregulation 1.15A(3) requires a decision-maker to have regard to 'all the circumstances of the relationship, including, in particular' those specified in paragraphs (a) to (d). ..."*
54. It was submitted that in this instance the Applicant is seeking to persuade the court to undertake the type of scrutiny mandated against the *Minister for Immigration and Multicultural Affairs v Wu Shan Liang* (1996) 185 CLR 259.

Reasoning

55. Whilst the Tribunal appears to have introduced a phrase which is not a mere recitation of the criteria set out in the Regulation, it does not follow, in my view, that it has introduced a new test.
56. The use by the Tribunal of the expression, *"a close mutually supportive, emotionally connected relationship"* does no more than to pick up the language in the Regulation. It is noted in particular that the Regulation clearly introduces a concept of *"mutuality"* by reference in Regulation 1.15A(1A) (3)(d)(iii) where reference is made to the words *"a degree of companionship and emotional support that the persons draw from each other"* (emphasis added).
57. I otherwise accept, as submitted by the First Respondent, that the Tribunal is doing no more than engaging in analysis consistent with the requirements of the Regulation by considering the nature of the relationship. It is clear that the Regulations require the Tribunal to have regard to all the circumstances of the relationship. So much is evident from Regulation 1.15A(3), which requires the decision-maker to have regard *"to all the circumstances of the relationship"* and then provides a number of matters which can be included.

58. Those matters were clearly addressed by the Tribunal and it otherwise analysed the claim in a manner free of jurisdictional error. It was entitled to consider whether the relationship was *"a close mutually supportive and emotionally connected relationship"*. Those terms, in my view, appear consistent with the task of analysing whether indeed, having regard to all the circumstances of the relationship, the Tribunal can be satisfied that it was, for the purposes of the Regulations, a genuine spousal relationship. It is clear that the criteria require the Tribunal and/or any other decision-maker to take into account matters including companionship, emotional support and mutuality.
59. I can see no error in the manner in which the Tribunal has approached its task and I do not regard its general description as introducing a new or different test. Its reasoning, which appears in some detail, ultimately led to a significant conclusion, particularly in relation to the parties' relationship in Australia, which appeared in the Tribunal's decision as follows:

"64. The sponsor then returned to Australia in January 2003 where the visa applicant joined her in March 2004. As indicated above the relationship never developed into the kind of mutually supportive and genuinely committed relationship that would meet the requirements of regulation 1.15A and, on the contrary, quickly (the visa applicant gave evidence at the hearing of problems emerging after 2 months but in the affidavit filed with the Family Court he declares that 'the first month or so I did not experience any difficulties') lapsed into conflict over gambling, drinking and the sponsor's errant lifestyle. The Tribunal considers that although regulation 1.15A does not require parties to meet an idealised romantic notion of a spousal relationship it contemplates, as a minimum, that the parties will be mutually committed to a shared life together. The Tribunal has considered the evidence in relation to the parties' commitment to each other as part of the totality of evidence in relation to regulation 1.15A. In light of the brevity of the relationship, the focus of the sponsor on accessing the visa applicant's money and the absence of mutuality of support and companionship the Tribunal is not satisfied that at any time the parties were in a spousal relationship as contemplated by regulation 1.15A."

60. In my view, the Tribunal's analysis of the relationship, which appears in the extract set out earlier in this judgment, together with paragraph 64 set out above, does not reveal any jurisdictional error and nor does it

reveal the introduction by the Tribunal of a new or different test. Rather, I am satisfied the Tribunal has correctly applied the relevant criteria.

Ground 5 – Failure to comply with s.359A

Applicant's submissions

61. The claim of failure to comply with s.359A of the Act relates to the Tribunal's alleged failure to include in its s.359A letter reference to the sponsor's lack of commitment generally or at any one point of time to the relationship. It was submitted that the Tribunal should have provided information to the Applicant revealing that it had concerns about the sponsor's commitment to the relationship, or indeed even indicating that a second marriage ceremony which occurred between the parties on 3 April 2004, some three weeks after the Applicant arrived in Australia, *"was a sham or that the sponsor falsely took her vows"*.
62. The failure by the Tribunal to include in the s.359A letter reference to information which formed part of its reasons for decision or failure to ensure the Applicant understood why the information in the s.359A letter is relevant constituted a breach of s.359A. It was submitted that the information which should have been conveyed to the Applicant could not be simply regarded as part of the Tribunal's thought processes.

First respondent's submissions

63. The First Respondent submitted that s.359A(1)(a) requires the Tribunal to give particulars of *"information"* that it considers would be the reason or part of the reason for affirming the decision.
64. The statement by the Tribunal that it was not satisfied the sponsor had a genuine commitment to a shared life with the Applicant is not *"information"* for the purpose of s.359A. The Tribunal is not required in the discharge of its obligations under s.359A to provide to the Applicant its subjective appraisals, thought processes or evaluative conclusions. The First Respondent referred the court to the decision of

the Full Court of the Federal Court in *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 206 ALR 471 where the court relevantly states as follows:

“[24] As to the first of these, there is now a considerable body of case law concerned with the compass of the term “information” in its s 424A(1) setting. The following propositions emerge from it:

(i) the purpose of s 424A is to provide in part a statutory procedural analogue to the common law of procedural fairness: Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396 at 429–30 [104] ; 64 ALD 289 at 318. However the obligation imposed is not coextensive with that which might be imposed by the common law to avoid practical injustice: VAAC v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 74; BC200301782;

(ii) the word “information” in s 424A(1) has the same meaning as in s 424: Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212 at 218 [20]; and in this setting it refers to knowledge of relevant facts or circumstances communicated to or received by the tribunal: Tin v Minister for Immigration and Multicultural Affairs [2000] FCA 1109; BC200004607 at [3]; irrespective of whether it is reliable or has a sound factual basis: Win, at 217–18 [19]–[22]; and

(iii) the word does not encompass the tribunal’s subjective appraisals, thought processes or determinations: Tin at [54]; Paul at FCR 428 [95]; ALD 317; Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 1679; BC200107472 at [25]; approved [2002] FCAFC 120; BC200203793; nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc: WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 276 at 282–4 [26]–[29].”

65. Reference was also made to *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 150 FCR 214 where it was accepted that the word "information" refers to "knowledge of relevant facts or circumstances communicated to or received by the Tribunal".
66. It was further submitted that in this instance the Tribunal made its assessment on the evidence of the Applicant and information provided

by the Applicant. The Tribunal's reasoning process does not of itself constitute information for the purposes of s.359A.

Reasoning

67. In my view, the Tribunal's s.359A letter correctly identified concerns the Tribunal had in relation to information it received, namely letters and information from the sponsor. That information provides a clear example, in my view, of the type of information which the Tribunal is bound to disclose to the Applicant and which, pursuant to s.359A, is bound to seek comment. It did so correctly.
68. I am not satisfied that in the present application the conclusion concerning the lack of commitment by the sponsor to the relationship could properly be regarded as "*information*" for the purposes of s.359A, having regard to the authorities relied upon by the First Respondent. It is not the responsibility of the Tribunal to identify deficiencies in the evidence prior to drawing adverse conclusions.
69. In this instance the Tribunal has simply made an assessment of the evidence and information provided by the Applicant for the purpose of the application, and the issue concerning the lack of commitment by the sponsor to the relationship does not, in my view, give rise to any obligation pursuant to s.359A.
70. It follows therefore that this ground should fail.

Conclusion

71. For the reasons given, the appropriate orders are that the application should be dismissed with costs.

I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 22 May 2007